

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN DAVID MARSHALL,

Defendant-Appellant.

UNPUBLISHED

August 5, 2014

No. 313814

Wayne Circuit Court

LC No. 12-002077-FC

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

STEPHENS, J. (*concurring*)

The majority has correctly concluded that defendant's conviction should be affirmed. I concur that defense counsel failed to argue at trial or on appeal that the testimony of neither John Vucetich, section manager with Child Protective Services, nor Barbara Smith, head of guidance counseling at the Detroit Public Schools, was admissible under MRE 803(10). I also concur that the trial court did not abuse its discretion for failure to analyze the admission of their testimony *sua sponte* under the correct rule. However, I diverge from the majority's analysis that the evidence was either speculative or of little probative value.

It is axiomatic to the rule allowing testimony concerning the absence of a public record that there is a presumption that public officers perform their duties. The victim's teacher, Mr. Greg Geck, was required by law to report abuse, MCL 722.623; Smith was required by the same law to report the matter to the Department of Human Services, which in turn had a duty to maintain a record of the report and undertake an investigation, MCL 722.628. Child Protection Law, 1975 PA 238, MCL 722.621 et seq. In a case that was decades old, with no physical evidence or testimony by the victim that a report was made to a teacher, testimony regarding the absence of a record had significant probative value. The testimony of both excluded witnesses was necessary to provide such evidence. "When a party desires to prove the negative fact that there is no record, he must do so in the usual way,-by the deposition of the proper officer, or by producing him in court, so that he may be sworn and cross-examined as to the thoroughness of the search made." *People v Braswell*, 12 Mich App 685, 687-688; 163 NW2d 461 (1968) (quotation omitted).

I do agree with the majority that the failure of defense counsel to secure the testimony of Mr. Geck did not render counsel ineffective under these circumstances. Given the exclusion of

Smith and Vucetich as witnesses, the testimony of Mr. Geck, who we are told had no memory of whether there was a report, would not have affected the outcome of the case.

/s/ Cynthia Diane Stephens